IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

Sanskaran
vs.
State of Rajasthan and others.

S.B.CIVIL SECOND APPEAL NO.23/2006 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 7.11.2005 PASSED BY SHRI SURENDRA MOHAN SHARMA, ADDITIONAL DISTRICT JUDGE NO.2, BIKANER IN APPEAL DECREE NO.25/2004.

DATE OF JUDGMENT ::: 16.1.2006

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. RK Singhal, for the appellant.

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BY THE COURT:

Heard learned counsel for the appellant.

The appellant is aggrieved against the judgment and decree dated 7.11.2005 by which the appellate court reversed the judgment decree passed by the trial court dated 21.3.2003 and dismissed the suit of the appellant.

Brief facts of the case are that the plaintiff/appellant filed a suit for permanent injunction on the ground that the plaintiff is in possession of small piece of land for which he prayed for regularisation upon which an order was passed in favour of the plaintiff to deposit 50% of the cost of land Rs.3,650/- which the plaintiff has deposited. The plaintiff's case was recommended for regularisation but during this period, the plaintiff was sought to be evicted, therefore, the plaintiff filed the suit for injunction. The trial court decreed the suit of the plaintiff and restrained the defendant from evicting the plaintiff from the suit shop.

The respondents preferred regular first appeal which was allowed by the first appellate court vide judgment and decree dated 7.11.2005 after holding that the plaintiff has no right to remain in possession of the suit property. The respondents have legal right to remove the encroachments and the first appellate court also held that the suit of the plaintiff itself was not maintainable.

Learned counsel for the appellant vehemently submitted that the respondents preferred appeal before the first appellate court after expiry of period of limitation and they submitted an application for condonation of delay. The first appellate court decided the application for condonation of delay and the appeal itself by the impugned judgment. According to learned counsel for the appellant, in view of the judgment of this Court delivered in case of SB Civil Writ Petition No.5819/2004 (Kartar Singh vs. Board

of Revenue and ors.), the appeal is competent only when the delay is condoned. The appellate court is required to first decide whether the appeal is in limitation and if not in limitation, then whether the delay in filing the appeal can be condoned. Once the delay is condoned, then the appeal can be registered as regular appeal and thereafter, only it can be decided. It is further submitted that the first appellate court committed serious error of fact and law in condoning the delay.

Learned counsel for the appellant also submitted that the first appellate court erred in holding that the appellant is trespasser despite the fact that the appellant was asked to deposit the cost of regularising the land and he deposited the cost, therefore, he cannot be treated as trespasser. Hence, the defendants could not have asked the appellant to vacate the suit shop.

I have considered the submissions of learned counsel for the appellant and perused the reasons given by the first appellate court.

It is true that the time barred appeal is not properly instituted appeal till delay is condoned. It is desirable that first the question of limitation be decided by the courts and in case, where the application for condonation of delay is there, the Court should pass an order on the application. In case, delay is condoned, the appeal becomes competent and thereafter, the appeal may be decided on merits.

In the present case, the appellant himself took active part in prompting the Court to decide the application under Section 5 of Limitation Act and appeal on merits. Before deciding the appeal on merits, the first appellate court considered the arguments on the issue of condonation of delay and condoned the delay in filing the appeal and thereafter, allowed the appeal on merits. Once the party by his active participation allows the Court to proceed in a particular manner, he cannot raise objection against the manner in which the Court proceeded unless it is in gross violation of any legal provision. The entire scheme of CPC shows that the appeal can be heard after condoning the delay. In this case, the delay was condoned after hearing the plaintiff and thereafter, the appeal was decided on merits by this Court. There is no illegality committed by the first appellate court in the facts of the case.

So far as condonation of delay is concerned, this Court is not inclined to entertain such an objection because the first appellate court held that there was sufficient cause for not preferring appeal in time.

So far as legal right of the appellant is concerned, it cannot be claimed merely because one of the officer of Mandi Vikas Samiti directed the plaintiff to deposit 50% of the amount for regularisation of the land because this cannot create a right in the property. It is not in dispute that the land has not been regularised in favour of the appellant even till today.

In view of the above, the first appellate court did not commit any illegality in allowing the appeal and dismissing the suit.

In view of the above, I do not find any merit in the appeal. No substantial question of law is involved in this appeal, therefore, this appeal deserves to be dismissed, hence, dismissed.

(PRAKASH TATIA), J.

S.Phophaliya